(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Pacific Refining Company	)	EPCRA Appeal No. 94-1
Docket No. EPCRA-09-92-0001	)	

[Decided December 6, 1994]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

PACIFIC REFINING COMPANY

EPCRA Appeal No. 94-1

FINAL DECISION AND ORDER

Decided December 6, 1994

Syllabus

U.S. EPA Region IX appeals an order of the Presiding Officer assessing a civil penalty against Pacific Refining Company (Pacific) for alleged violations of § 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11023, and the rules implementing EPCRA. Region IX had issued a complaint charging Pacific with twelve counts of failure to file 1989 "Form Rs" reporting Pacific's use of certain regulated chemicals. The complaint sought penalties totalling $300,000. Following a hearing, the Presiding Officer found Pacific liable on ten of the twelve counts. The Presiding Officer imposed a total penalty against Pacific of $25,000 ($20,000 for the first count, and a total of $5000 for the remaining nine counts). The Region appealed, claiming error in the Presiding Officer's penalty determination.

Held: The Board agrees that the Presiding Officer erred in determining the amount of the penalty, and instead assesses a total penalty against Pacific of $111,762. First, the Presiding Officer erred by failing to consider the Agency's 1992 Enforcement Response Policy (ERP) in determining the gravity-based penalty applicable to Pacific's violations. Under the 1992 ERP, the appropriate gravity-based penalty is $24,836 for each of the ten violations, totalling $248,360. Second, the Board concludes that the record supports downward penalty adjustments totalling 55% of the gravity-based penalty, for a total civil penalty of $111,762.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich, in which Judge Firestone joined. Judge McCallum filed a dissenting opinion, post p. 20:

U.S. EPA Region IX appeals an order of the Presiding Officer assessing a civil penalty against Pacific Refining Company (Pacific) for alleged violations of § 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11023, and the rules implementing EPCRA relating to chemical reporting requirements, 40 C.F.R. § 372.30. Under EPCRA § 313 and the implementing regulations, the owners and operators of a facility subject to the requirements of EPCRA § 313(b) are required to submit annually, by July 1, a Toxic Chemical Release Inventory Reporting Form (Form R) for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established threshold amounts. A facility may be subject to civil penalties of up to $25,000 for each violation of § 313. EPCRA § 325(c)(1).

The Region's complaint stemmed from an inspection of Pacific's facility in May 1991 that revealed alleged failures to timely file 12 Form Rs for calendar year 1989. The Region sought civil penalties totalling $300,000 ($25,000 for each of the 12 alleged violations). Following an evidentiary hearing, the Presiding Officer found Pacific liable on ten counts and assessed a total penalty against

Pacific of $25,000 ($20,000 for Count I and a total of $5000 for the nine remaining counts).[1]

Pacific concedes that its Form Rs for 1989, due to be filed with the Agency by July 1, 1990, were not filed until June 28, 1991, and that it therefore violated the requirements of EPCRA § 313. The only dispute on appeal relates to the Presiding Officer's assessment of a penalty for the violations. The Region contends on appeal that the Presiding Officer's penalty assessment for the ten counts upon which Pacific was found liable deviated unreasonably from the Agency's *Enforcement Response Policy for Section 313 of [EPCRA]*, (Dec. 2, 1988) (1988 ERP), and the *Enforcement Response Policy for Section 313 of [EPCRA] and Section 6607 of the Pollution Prevention Act (1990)*, (Aug. 10, 1992) (1992 ERP).[2] In response, Pacific argues that the penalty assessed by the Presiding Officer was well within the discretion afforded him under the applicable regulations. For the reasons explained below, we conclude that the EPCRA penalty

---

[1] The Presiding Officer concluded that three counts of the complaint, charging three separate violations of § 313 for late reports concerning the xylene isomers m-xylene, o-xylene, and p-xylene, should be treated as one violation because Pacific could have reported the chemicals on one form as "mixed isomers" of xylene. The Region has not appealed this aspect of the Presiding Officer's decision.

[2] The 1992 ERP explains that since issuance of the 1988 ERP, "EPA has identified opportunities for refining and adding clarity to [the 1988] policy. This revised [ERP] incorporates three years of enforcement experience with [EPCRA § 313]." 1992 ERP at 1. The 1992 ERP emphasizes:

> *This policy is immediately applicable and will be used to calculate penalties for all administrative actions concerning EPCRA Section 313 issued after the date of this policy, regardless of the date of the violation.*

Id. (emphasis in original).

The 1988 and 1992 ERPs set forth guidelines for calculating penalties for violations of § 313 that take into account statutory penalty factors reflecting characteristics of the violation and characteristics of the violator. *See* EPCRA § 325. Penalties are calculated in accordance with a two-step process. First, a gravity-based penalty reflecting characteristics of the violation is determined utilizing a penalty matrix. Second, after a gravity-based penalty amount is determined, upward or downward adjustments may be made to take account of factors reflecting characteristics of the violator. Two factors are considered in assessing the gravity-based penalty: the "circumstances" of the violation and the "extent" of the violation. *See* 1992 ERP at 8; 1988 ERP at 6-7. The "circumstances" of the violation relate to its seriousness, taking into account the accuracy and availability of the information, and are reflected on the vertical axis of the matrix. *See* 1992 ERP at 8, 11. The "extent" of the violation is measured by the amount of the chemical used by the facility, the facility's size, and the gross sales of the facility's total corporate entity. "Extent" is reflected on the horizontal axis of the matrix. *Id*. The 1988 and 1992 matrices differ only in nomenclature: the horizontal axis denominated as "adjustment levels" in the 1988 matrix are more accurately referred to as "extent levels" in the 1992 matrix. 1988 ERP at 9; 1992 ERP at 11. The penalty amounts in each cell on the 1992 matrix are the same as the 1988 matrix. *Id*.

guidelines were not correctly applied with respect to Pacific's violations of EPCRA § 313. We instead assess a penalty of $24,836 against Pacific for each of the ten violations, reduced by 55% as explained below upon consideration of the adjustment factors set forth in the 1992 ERP, for a total civil penalty of $111,762.

I. *BACKGROUND*

The relevant facts underlying the Region's complaint are set forth in the Presiding Officer's Initial Decision, and are not in dispute. Pacific operates a petroleum refinery in Hercules, California. Pacific's Form Rs for 1987 and 1988, identifying chemicals used by Pacific in its refining process above regulatory threshold amounts, were timely filed with the Agency.[3] However, Pacific's Form Rs for 1989 were not filed by the July 1, 1990 due date, but were instead filed on June 28, 1991, together with Pacific's 1990 Form Rs.

The Presiding Officer found that the delay in reporting was attributable to a change in Pacific's ownership and "sweeping changes in management in late 1989 or early 1990." Initial Decision at 12. Pacific named a new environmental manager in September 1990. *Id*. Pacific's environmental manager conducted an environmental audit of the facility, and sometime in the Spring of 1991 Pacific discovered that the Form Rs for 1989 had not been filed. *Id*. at 9. The discovery occurred prior to EPA's inspection in May 1991. *Id*. Pacific did not, prior to the inspection, disclose the violation to EPA. Instead, the new environmental manager directed Pacific's personnel to complete the 1989 forms and file them together with the 1990 Form Rs by the July 1, 1991, deadline for the 1990 reports. *Id*. Following the EPA inspection in May 1991, the inspector suggested to Pacific that the 1989 Form Rs be filed within 30 days. *Id*. at 11. Pacific retained outside consultants to assist in preparation of the forms, and filed them on June 28, 1991, within the time suggested by the EPA inspector. *Id*. at 11-12. The Presiding Officer concluded that Pacific acted in a cooperative and compliant manner during EPA's inspection, in providing the 1989 Form Rs, and in the enforcement process, and that Pacific undertook initiatives to insure that the violation would not be repeated. *Id*. at 11-12, 18.

---

[3] EPCRA was enacted in 1986, and 1987 was the first year for which § 313 reporting was required.

In assessing a penalty for the ten violations of § 313, the Presiding Officer considered the guidance set forth in the 1988 ERP.[4] In accordance with the 1988 ERP, he first determined a gravity-based penalty for the violations. The Presiding Officer rejected the Region's contention that the violations should be deemed as "circumstance level 1," non-reporting or failure to file a report. This is the highest circumstance level available on the matrix, carrying the maximum $25,000 per violation penalty. "Failure to report" is defined in the 1988 ERP as follows:

> If a report is submitted by a facility after the reporting deadline and after being contacted by EPA or an EPA representative in preparation for a pending inspection or for purposes of determining compliance or in the absence of such contact, after EPA begins an inspection (i.e., issuance of a Notice of Inspection), the violation is considered a failure to report violation.

1988 ERP at 8. Instead, the Presiding Officer concluded that the violation was more appropriately characterized as "circumstance level 2" under the 1988 ERP, or "late reporting after 180 days." This circumstance level carries a maximum $20,000 per violation penalty, and is defined as follows:

> To be considered a late report instead of a failure to report for those reports submitted after the deadline of July 1, the report must be submitted prior to the facility being contacted by EPA or an EPA representative in preparation for a pending inspection or for purposes of determining compliance or in the absence of such contact, prior to the date of the inspection. Any report which is submitted after such contact/inspection is to be treated the same as a nonreport in assessing the penalty.

Id. The Presiding Officer thus rejected a literal reading of the 1988 ERP (which would place Pacific's violations squarely within circumstance level 1, because the forms were submitted after the EPA inspection). Initial Decision at 8. The Presiding Officer instead considered the fact that Pacific had discovered the filing

---

[4] The Presiding Officer did not refer to the 1992 ERP in his Initial Decision. As explained in the text of this opinion, this omission is significant because of the nature of the violations at issue here. The 1992 ERP makes clear that it is intended to apply to "*all administrative actions * * * issued after the date of this policy, regardless of the date of the violation.*" 1992 ERP at 1 (emphasis in original). Both the Region and Pacific recognize the 1992 ERP's applicability to these proceedings. *See* Region's Notice of Appeal at 1; Pacific's Reply to Appeal at 6, n.3.

error and was in the process of rectifying the error at the time of the inspection. He cited with approval other ALJ decisions (all predating the 1992 ERP) which found the distinction between filings made before and after inspections to be "artificial and failing to satisfy the statutory requirement that the Administrator consider the nature, circumstances, extent and gravity of the violation." *Id*. at 9.[5]

The Presiding Officer then considered the "penalty adjustment level." He found that the appropriate level was "A", on the basis of the size of the facility and quantity of § 313 chemicals used. *Id*. at 10. Under the 1988 ERP matrix, "circumstance level 2" and "adjustment level A" yield a gravity-based penalty of $20,000 for each violation.[6]

The Presiding Officer next turned to the "adjustment factors" identified in the 1988 ERP to determine whether any upward or downward adjustment should be made in the gravity-based penalty. Those factors, as described in the 1988 ERP, are: (1) voluntary disclosure of the violation (maximum of 50% downward adjustment); (2) culpability, including the violator's knowledge (no downward adjustment, potential per-day penalties for "knowing" or "willful" violations), control over the violative condition (maximum of 25% downward adjustment), and attitude of the violator (maximum of 15% upward or downward adjustment); (3) history of prior violations (upward adjustment only); (4) ability to continue in business; and (5) "such other factors as justice may require," such as new ownership when "history of violations" is an issue, or environmentally beneficial expenditures. 1988 ERP at 13-17.

Based upon his consideration of the "adjustment factors," the Presiding Officer concluded that although each of the ten counts for which liability was established carried a potential $20,000 penalty, a total penalty of $25,000 for all ten counts was appropriate (a $20,000 penalty for one count, and $5000 total for the remaining nine counts). The Presiding Officer stated:

> No mathematical formula was used to determine this amount. This penalty gives recognition to the array of factors considered

---

[5] Citing *In re CBI Services*, Docket No. EPCRA-05-1990 (ALJ, Mar. 13, 1991); *In re Colonial Processing*, Docket No. EPCRA-89-0114 (ALJ, June 24, 1991); *In re Crown Metal Finishing Co.*, Docket No. EPCRA-02-89-0103 (ALJ, July 31, 1992); *In re Pease and Curren*, Docket No. EPCRA-01-90-1008 (ALJ, Mar. 13, 1991); and *In re Riverside Furniture Corp.*, Docket No. EPCRA-88-VI-4068 (ALJ, Mar. 27, 1989).

[6] As noted, *supra* n. 2, the penalty amount using circumstance level 2 and "adjustment level" ("extent level" under the 1992 ERP) "A" is the same under both the 1988 and 1992 ERPs.

> above which bear on the violation -- the cooperation shown by Pacific during the inspection and afterwards in supplying information to the EPA, its conduct and actions in response to the violation, the initiatives taken to insure that there will not be a repeat violation, the change in management during the period when the reports should have been prepared, and the lack of evidence to show that any potential threat to the environment multiplied with each late filing.

Initial Decision at 18.

The Region contends that this penalty determination is flawed in several respects. The Region argues that the Presiding Officer did not properly base his assessment on the relevant penalty guidelines, and that the resulting penalty is inconsistent with, and undermines, the EPCRA reporting scheme. The Region claims that the Presiding Officer should have assessed a gravity-based penalty for each violation for which Pacific was found liable, and that in failing to do so the resulting penalty was far below the range prescribed by the penalty guidelines. The Region also contends that the Presiding Officer erred in applying the "adjustment factors" to the gravity-based penalty, and that no adjustment is warranted. The Region states that a total penalty of $200,000 should be assessed ($20,000 for each of the ten violations). In response, Pacific contends that the $25,000 total penalty was well within the Presiding Officer's discretion, and is supported by the evidence adduced at the hearing.

II. *DISCUSSION*

The regulations governing this proceeding give the Presiding Officer the discretion "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). Although the Presiding Officer must "consider" any penalty guidelines, he is not bound by them. *Id*. As the Presiding Officer correctly observed in the Initial Decision:

> Penalty assessments * * * require the exercise of reasoned judgment applied to the facts of a case. * * * Strict and faithful allegiance must at all times be paid to the underlying EPCRA statute. * * * Where the facts warrant, the [Presiding Officer] may adjust the proposed penalties up or down in recognition of

> [statutory] criteria and to accomplish the purposes and objectives of the statute.

Initial Decision at 6-7.

The regulations also give the Board the discretion to increase or decrease the penalty assessed in the initial decision. 40 C.F.R. § 22.31(a). Further, the Board has recently confirmed that while penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed. *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB, June 29, 1994) (addressing Respondent's contention that rigid application of penalty policy is inappropriate because the policy is not a regulation promulgated in accordance with the Administrative Procedure Act) (citing *In re Genicom Corp.*, EPCRA Appeal No. 92-2 (EAB, Dec. 15, 1992); *In re ALM Corporation*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991)).

In general, when the Presiding Officer does assess a penalty that falls within the range of penalties provided in the penalty guidelines, the Board will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *In re Mobil Oil Corporation*, EPCRA Appeal No. 94-2, at 31 (EAB, Sept. 29, 1994); *In re Ray Birnbaum Scrap Yard*, TSCA Appeal No. 92-5, at 5 (EAB, Mar. 7, 1994); *In re Bell & Howell Co.*, TSCA Appeal No. TSCA-V-C-033, 034, 035, at 19 (JO, Dec. 2, 1983). In this case, because the Presiding Officer in his Initial Decision did not consider the 1992 ERP in determining the penalty (nor explain in his Initial Decision his reasons for not doing so), and because some aspects of the Presiding Officer's penalty determination are simply too vague for us to sustain,[7] we find such error in this case and accordingly assess a penalty different than that assessed by the Presiding Officer. However, we agree with the Presiding Officer's determination that it is appropriate in this case to allow a significant downward adjustment from the gravity-based penalty based on the application of the 1992 ERP and the statutory penalty factors.

---

[7] For example, the Presiding Officer did little to explain how or why he decided to allocate the penalty amounts among the ten violations when he assessed $20,000 for one count and $5,000 collectively for the remaining nine counts (except to note that penalty assessments do not lend themselves to "slide rule calculation"). Initial Decision at 6. Our assessment of his reasons in this regard would require us to engage in conjecture, which should not be necessary in order to discern a Presiding Officer's reasons for deviating from a recommended penalty.

The 1992 ERP differs from the 1988 ERP in a respect that is relevant to the gravity-based penalty calculation in this case: it eliminates the distinction between late reports filed before an EPA contact or inspection (circumstance level 2 under the 1988 ERP) and late reports filed after EPA contact or inspection (deemed a circumstance level 1 "failure to report" under the 1988 ERP). Instead, the 1992 ERP characterizes both "late reporting" and "failures to report" as simply "failures to report *in a timely manner*," without regard to whether the report occurs before or after an EPA contact or inspection. 1992 ERP at 4.

The 1992 ERP establishes two categories of untimely reporting violations: a "Category I" violation occurs when a report is submitted more than one year later than its original July 1 due date. "Category I" violations are considered "circumstance level 1" violations under the penalty matrix. 1992 ERP at 4. In contrast, a "Category II" violation occurs when a report is submitted after its July 1 due date, but *before* July 1 of the following year. *Id*. at 4. The 1992 ERP creates a "per day" penalty formula for Category II violations that factors the number of days a report is late into a total penalty calculation. *Id*. at 13-14. Because Pacific's reporting violations would plainly fall within Category II of the 1992 ERP (since the 1989 reports were filed on June 28, 1991, less than one year after the July 1, 1990 due date), it was error for the Presiding Officer not to consider application of the 1992 ERP's "per day" penalty formula. This is especially the case since one of the Presiding Officer's main concerns with application of the 1988 ERP was the "artificial" distinction between reports filed before and reports filed after EPA inspections. Initial Decision at 9. As noted, the 1992 ERP eliminates this distinction.

Based on the record before us, we discern no sound reason why the 1992 ERP's penalty formula for untimely reporting should not be applied to derive a gravity-based penalty in this case. The 1992 ERP's gravity-based penalty formula applicable to Category II untimely reporting violations is as follows:

$$\text{Level 4 Penalty} + \frac{(\text{\# of days late} - 1) \times (\text{Level 1} - \text{Level 4 Penalty})}{365}$$

Id. at 14. Using this formula, the gravity-based penalty applicable to Pacific utilizing circumstance levels 1 and 4 with "extent level A" is calculated as follows:[8] The per-violation penalty for circumstance level 4, extent level A is $10,000. The per-violation penalty for circumstance level 1, extent level A is $25,000. Thus:

$$\$10{,}000 + \frac{(362 - 1) \times (\$25{,}000 - \$10{,}000)}{365}$$

= $24,836 per-violation untimely reporting penalty.

Therefore, utilizing the formula set forth in the 1992 ERP, Pacific is subject to a gravity-based penalty of $24,836 for each of the ten violations for which the Presiding Officer determined Pacific was liable. We accordingly determine that the gravity-based penalty should be $24,836 for each of the ten violations, for a total gravity-based penalty of $248,360.

We next turn to consideration of penalty factors relating to the violator to see if any adjustments (downward or upward) in the gravity-based penalty are appropriate. *See* 1992 ERP at 8, 14-20. The Region contends that any downward adjustments are inappropriate.[9] Pacific argues that the adjustments made by the Presiding Officer were well-supported. In the Initial Decision, the Presiding Officer concluded that, based on his consideration of the "adjustment factors" in the 1988 ERP, a total penalty substantially below the gravity-based penalty should be assessed. Initial Decision at 18. He considered an "array of factors" that he believed supported an assessment of one $20,000 penalty for one violation (the maximum penalty under the Presiding Officer's application of the 1988 ERP), and a total $5000 penalty for the remaining nine violations (approximately $556 for each of the nine remaining violations, or just under 3% of the maximum potential $20,000 per violation penalty under the Presiding Officer's application of the 1988 ERP). Although we agree with the Presiding Officer and Pacific that a substantial downward adjustment in the gravity-based penalty is appropriate under the

---

[8] As noted above, the amounts for "extent level A" under the 1992 ERP and "adjustment level A" for the 1988 ERP are the same in both matrices. Pacific has not challenged the Presiding Officer's application of adjustment/extent level "A" in calculating the gravity-based penalty.

[9] Pacific contends that because Region IX left the issue of penalty adjustments to the Presiding Officer's discretion, the Board should not consider on appeal the Region's contention that no adjustments are warranted. Pacific's Brief at 8, n.6. However, the Board has the independent authority to make penalty adjustments in appropriate cases, and to consider arguments respecting adjustments on appeal. *See* 40 C.F.R. § 22.31(a); *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, at 25 (EAB, Oct. 20, 1994).

circumstances of this case, the reduction allowed by the Presiding Officer is not reasonable in light of the policy underlying EPCRA and the 1992 ERP.

The first adjustment factor enumerated in the 1992 ERP is "voluntary disclosure" of the violation. It is undisputed that Pacific's violations were not voluntarily disclosed to EPA but came to EPA's attention during an inspection in the Spring of 1991. Therefore, no downward adjustment for this factor is appropriate.[10]

The second adjustment factor is "history of prior violations." In accordance with the 1992 ERP, a history of prior violations may be grounds for *increasing* a gravity-based penalty, since the penalty matrix is intended to apply to "first offenders" and repeat offenders should be punished more harshly. 1992 ERP at 16. There is no allegation that Pacific has a history of EPCRA § 313 violations; to the contrary, except for the 1989 reports Pacific apparently had a good history of compliance with EPCRA. Accordingly, no upward adjustment need be made for this factor.

The next relevant adjustment factor under the 1992 ERP[11] is "attitude" of the violator.[12] This adjustment factor includes two components which may each be the basis for separate penalty reductions at a maximum of 15% each: (1) cooperation; and (2) compliance. 1992 ERP at 18. "Cooperation" is evaluated in light of the violator's behavior during the compliance evaluation and enforcement process, and includes "degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process." *Id*. Under the "compliance" component "the Agency may reduce the gravity-based penalty in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." *Id*.

The Presiding Officer cited numerous factors supporting his conclusion that "Pacific at all times acted in a cooperative and compliant manner in its handling

---

[10] Voluntary disclosure is a key element of virtually all of the Agency's penalty policies. We note that had Pacific immediately disclosed its violations to EPA, it could have been eligible for potential penalty reductions of up to 50% of the gravity-based amount. *See* 1992 ERP at 14-16.

[11] The 1992 ERP provides for penalty adjustments for reporting violations involving "delisted chemicals," but that factor is not at issue in this case.

[12] "Attitude" was previously considered under the rubric "culpability" in the 1988 ERP, and the 1988 ERP suggested a maximum 15% penalty reduction for good attitude.

of this matter." Initial Decision at 11. The Presiding Officer specifically noted that Pacific's environmental manager had discovered the late filing and, prior to EPA's inspection, directed that the tardy Form Rs be prepared; that Pacific retained outside environmental consultants to assist in completing the forms immediately following the inspection; that the forms were filed within the period recommended by the EPA inspector; and that Pacific's environmental staff cooperated with EPA during the inspection and enforcement process. *Id*. at 11-12. The Presiding Officer observed that following management changes in 1990 Pacific implemented measures to improve its environmental compliance controls, and made environmental compliance a priority. *Id*. at 12. He found that all Form Rs subsequent to 1989 were timely filed. *Id*.

With respect to "attitude," the Region asserts only that "the record shows that Pacific Refining did not attempt to comply until after it was contacted regarding this matter by EPA." Region's Brief at 21. However, the Region has offered no record cites or additional argument to persuade us not to accept the conclusions of the Presiding Officer summarized above. On the basis of the Presiding Officer's findings and conclusions with respect to Pacific's cooperative and compliant attitude, premised on his consideration of the testimony and evidence adduced at the hearing, we conclude that a 15% reduction in the gravity-based penalty for "cooperation" and a 15% reduction for "compliance" are supported by the record, and consistent with the 1992 ERP. *See In re Great Lakes*, *supra*, at 22 (deference accorded to presiding officers' credibility determinations); *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 91-1, at 28 n.59 (EAB, Aug. 5, 1992) (same).

The final adjustment factor under the 1992 ERP is "other factors as justice may require," including such factors as "new ownership" (for purposes of determining whether a facility's history of violations should result in a higher penalty) and "lack of control over the violation." 1992 ERP at 18. Under this rubric, other mitigating factors (including, on a case-by-case basis, factors not specifically enumerated under the 1992 ERP) may be considered, and an additional reduction of up to 25% of the gravity-based penalty may be allowed. *Id*. The 1992 ERP cautions that "[u]se of this reduction is expected to be rare," and its use must be well-supported in the record. *Id*.

In sharply reducing the gravity-based penalty for Pacific's reporting violations, the Presiding Officer was influenced by the fact that the violations occurred during a period of "chaotic conditions" at the facility stemming from ownership and management changes. Initial Decision at 12. These chaotic conditions lead to an "aberration" in Pacific's filing record, the facility having

previously complied fully with § 313's requirements. *Id*. The Presiding Officer acknowledged that management disruptions do not excuse failure to comply with environmental regulations. However, based on his evaluation of the evidence and testimony adduced at the hearing, the Presiding Officer was persuaded that Pacific had emerged from a turbulent period with a "hard nosed" commitment to sound environmental management that made future violations highly unlikely. The Presiding Officer concluded that:

> Irrespective of the penalty that may be imposed in this proceeding, the message has already been conveyed within Pacific that future late filings will not be tolerated.

Initial Decision at 12-13.

Because the 1992 ERP allows for the consideration of "other factors as justice may require," it was not error for the Presiding Officer to consider the totality of the circumstances giving rise to the violation in adjusting the gravity-based penalty, particularly when the Presiding Officer was persuaded by the evidence that such circumstances were truly aberrational, of limited duration and not likely to recur.[13] We find that the Presiding Officer's assessment, based at least in part on his evaluation of the credibility and demeanor of Pacific's witnesses at the hearing,[14] is sufficiently supported by the record to warrant our adjusting the assessed penalty based on this factor as well.[15] We therefore reduce the gravity-based penalty by an additional 25%, the maximum permitted by the 1992 ERP.

---

[13] The Region cautions that allowing management disruptions to mitigate the penalty will encourage poor management practices within the regulated community. Region's Brief at 21. We emphasize that our decision is limited to the narrow facts of the case presented, where the record indicates that the management disruption was of limited duration and was followed by intensive efforts to impose strict environmental management controls.

[14] For example, based on testimony at the hearing, the Presiding Officer deemed Pacific's environmental manager a "hard nosed" individual who would not tolerate future filing lapses. Initial Decision at 13.

[15] While we agree that an adjustment is warranted based on this factor, we reject Pacific's contention that downward adjustments are justified on the basis of "lack of control over the violation" (such as an employee's "disobedience") and "new ownership." Pacific claims that the ownership and management changes caused the employee who was responsible for filing the 1989 Form Rs to be overburdened with other tasks, and that the 1988 and 1992 ERPs provide that it might be unfair to burden new facility owners with the past owner's compliance history. Pacific's Brief at 13-14. We disagree. First, the ERPs make clear that "new ownership" is relevant only when there has been a history of prior violations that in fairness may not be attributable to the new owner. 1988 ERP at 16; 1992 ERP at 18. Such is not the case here. Further, while an employee's "disobedience" may provide some basis for reduction, *see* 1988 ERP at 14, in this instance any "disobedience" is attributable to the management changes, and we have accorded Pacific a substantial penalty reduction on that basis.

We recognize that neither the Presiding Officer nor this Board is bound by the penalty policies. Accordingly, we are free to allow for additional penalty reductions in appropriate circumstances based on a full consideration of the statutory penalty factors. In fact, we have deviated from the penalty policies on several occasions. *See, e.g., In re Ray Birnbaum Scrap Yard*, TSCA Appeal No. 92-5 (EAB, Mar. 7, 1994) (affirming ALJ's deviation from penalty policy's formula for calculating "ability to pay" because application of policy's formula resulted in unduly harsh penalty); *In re General Electric Co.*, TSCA Appeal No. 92-2a (EAB, Nov. 1, 1993) (affirming ALJ's decision to disregard penalty policy because risks underlying policy's assumptions were not present); *In re Mobil Oil Corp.*, EPCRA Appeal No. 94-2 (EAB, Sept. 29, 1994) (deviating from EPCRA penalty policy with respect to policy's "gravity" level because policy would have resulted in an overestimation of the potential threat of the release).

Nonetheless, we do not believe that the application of the statutory penalty factors compels us to depart from the 1992 ERP in this case and we decline to exercise our discretion to do so.[16] The circumstances of the violations are not so

---

[16] In his dissenting opinion, Judge McCallum criticizes the Board for "uncompromisingly" sticking to the Agency's penalty guidelines and assessing a penalty that is unduly punitive. Judge McCallum further expresses the hope that this decision "does not signal a trend" away from the line of cases indicating that neither a presiding officer nor the final decision-maker (now the Board) is bound by the penalty policies. He further states that his concern is heightened by the recent decision in *U.S. Telephone Ass'n v. Federal Communications Commission*, 28 F.3d 1232 (D.C. Cir., July 12, 1994) discussed in his dissent.

We believe Judge McCallum's concerns are unfounded, based on an erroneous set of assumptions about this decision and the Board's intent. First, as we noted in the text, we adhere fully to the principle that a presiding officer and the Board need only consider any applicable penalty guideline and is free to depart from it should the facts warrant. The Board has deviated from a penalty policy in a number of cases as cited in the text. Indeed, in a decision being issued today in *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, we reject the application of the penalty policy because it overestimates the gravity of the violation. We fail to see how Judge McCallum could perceive a "trend"; none exists.

Second, while it is likely that the Agency may at some future date have to address the implications of *U.S. Telephone Ass'n* for its penalty policies, the underlying legal issue was not raised in this case and therefore is not before this Board. The essential legal issue is whether the Agency can utilize its penalty policies in arriving at a penalty amount or whether it is somehow precluded by Administrative Procedure Act considerations from doing so. This issue was never raised by Pacific Refining below. To the contrary, Pacific Refining has actually quoted with approval Judge Lotis' statement that the penalty policy "provides guidance in the determination of the penalty". Pacific's Reply to Appeal at 10. Moreover, even the significance of *U.S. Telephone Ass'n* to this legal issue is uncertain, since there may well be distinctions between the Agency's penalty policies and the F.C.C. administrative penalty schedule at issue in *U.S. Telephone Ass'n* that might

(continued...)

extraordinary or unique that a penalty reduction beyond the 25% allowed for in the 1992 ERP is warranted. We believe that a 25% reduction, when combined with the 15% reduction for "cooperation" and the 15% reduction for "compliance," fully recognizes the circumstances of the violations. In this connection, we reiterate that this is not a case of voluntary disclosure, and Pacific's decision to delay disclosing its violations is a significant reason for the penalty being at the level assessed.[17]

We address finally the last factor identified by the Presiding Officer as supporting a penalty reduction. The Presiding Officer declined to impose the full gravity-based penalty for each of the ten violations in part because, in his view:

> [T]here is no indication in this record that the threat or danger to the environment increased 10 fold, or by any measurable extent, as a result of the multiple late filings. The chemicals reported on the 1989 Form Rs were the same chemicals that had been reported to the EPA in 1987 and 1988. The EPA, therefore, was on notice that these particular chemicals were present at the refinery. Indeed, the EPA inspection was triggered by EPA's own computer search which showed that Form Rs had been submitted for 1987 and 1988 but not 1989. Complainant Ex. 2, p.1. This is not a case where new chemicals, not previously known to EPA, were introduced into the refinery operations for the first time in 1989.

---

[16](...continued)
make that case inapposite. Certainly, to the extent the court there focused on the policy as applied, the presiding officers and this Board have varied from the Agency's penalty policies substantially more frequently than the FCC varied from its penalty schedule, as described by the court. In any event, we strongly believe that there is no reason to address this issue until it is squarely presented in an enforcement proceeding where the issue has been thoroughly briefed.

Finally, we strongly disagree with Judge McCallum's characterization of the penalty we assess today as punitive. It is undisputed that the penalty covers *ten* violations. The violations were not promptly self-reported; the company intended merely to send in the 1989 forms with its 1990 forms. In addition, we are not persuaded that Pacific's prior compliance history with EPCRA is so telling a factor when it amounted only to compliance for two years followed by a violation in the third. We think the reductions made in arriving at a final penalty amount fully recognized the company's cooperative and compliant attitude once the violation was uncovered. (While not a factor in our decision, we do note that the same Pacific Refining facility was the subject of a recent Board decision, *In re Pacific Refining Company*, TSCA Appeal 94-1 (EAB, Oct. 19, 1994), in which the Board assessed a penalty against the company for certain violations of the Toxic Substances Control Act.) In the Board's view, we do not believe that the penalty arrived at in this case using the Agency's penalty policy, which penalty is substantially less than the maximum authorized under the law, is punitive.

[17] *See* n.10 *supra*.

Initial Decision at 13.

Based on the purposes underlying EPCRA and the 1992 ERP, the Presiding Officer's rationale does not support any additional penalty reduction. EPCRA § 325 contemplates that penalties for violations of § 313 are to be imposed on a per-violation basis. EPCRA § 325(c)(1) ("Any person * * * who violates any requirement of section [312 or 313] *shall* be liable to the United States for a civil penalty in an amount not to exceed $25,000 *for each such violation*.") (emphasis added). The 1992 ERP confirms that penalties for violation of § 313 are to be imposed "for *each* violation on a per-chemical, per-facility, per-year basis * * *." 1992 ERP at 8 (emphasis added). EPCRA "is intended to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities." *Emergency Planning and Community Right to Know Programs, Interim Final Rule*, 51 Fed. Reg. 41,570 (Nov. 17, 1986). Section 313 is contained in EPCRA Subtitle B, which "provides the mechanism for community awareness with respect to hazardous chemicals present in the locality. This information is critical for effective local contingency planning." *Id*. A facility's failure to comply with EPCRA's annual toxic chemical reporting requirement for *each* chemical subject to the requirement potentially leaves a gap in the information available to federal, state and local planning officials. The per-violation penalties contemplated by EPCRA § 325(c)(1) are the means preferred by Congress to deter information gaps and redress violations, and the result may be substantial penalties for multiple violations.[18]

Further, the extent of the potential environmental harm from late § 313 filings is factored into the gravity-based penalty calculation on the penalty matrix, from which per-violation penalties are calculated. The 1992 ERP explains that the "circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government," while the "extent levels" are "based on [among other factors] the quantity of each EPCRA § 313 chemical manufactured, processed, or otherwise used by the facility * * * ." 1992 ERP at 8. The 1992 ERP explains that:

---

[18] *See also United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 733-37 (E.D. Mich. 1993) (penalty assessed for 20 violations of Clean Air Act by beginning with statutory maximum for each violation, and then making downward adjustments on basis of statutory penalty criteria); *Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.*, 800 F. Supp 1, 22-27 (D. Del. 1992) (penalty assessed for 365 violations of Clean Air Act by beginning with statutory maximum for each violation, and then making downward adjustments on basis of statutory penalty criteria).

> EPA believes that using the amount of § 313 chemical involved in the violation as the primary factor in determining the extent level underscores the overall intent and goal of EPCRA § 313 to make available to the public on an annual basis a reasonable estimate of the toxic chemical substances emitted into their communities from these regulated sources.

Id. at 9-10.

The fact that, as Pacific argues, the identity of the chemicals used in 1989 could be inferred from historical reporting does not alter the analysis. It should not be incumbent upon EPA or State and local agencies to fill in data gaps by extrapolating from data received prior to the violations. EPCRA § 313 places the burden squarely upon the regulated facility to ensure that EPA receives all information mandated by the statute.[19]

The adjustment factors described in the ERP provide ample opportunities in appropriate cases for reducing the per-violation gravity-based penalties mandated by EPCRA, and the reductions we have allowed recognize the Presiding Officer's conclusion that Pacific's multiple violations stemmed from one isolated set of unusual circumstances. In light of the statutory penalty scheme, there is simply no compelling basis for further reducing the per-violation gravity-based penalties on the grounds that Pacific's ten reporting violations may not have increased by tenfold any risk to the environment.

Accordingly, we assess a gravity-based civil penalty of $24,836 against Pacific for each of the ten violations, reduced by 55% (15% for "cooperation," 15% for "compliance," and 25% for "other factors as justice may require") for a total civil penalty of $111,762.[20]

---

[19] We are not persuaded by Pacific's claim that "other agencies knew that the chemicals were present at the refinery because Respondent filed a Hazardous Materials Business Plan with the appropriate local agency," and because "Respondent was engaged in ongoing discussions with the air district regarding any toxic emissions from its facility." Pacific's Brief at 16. Compliance with other environmental regulations and requirements does not mitigate Pacific's failure to comply with § 313 with respect to its 1989 Form Rs. *Cf. In re Mobil Oil Corporation*, *supra*, at 35 (compliance with notification requirement of State law does not relieve a facility of its obligation to report a release to local authorities under EPCRA).

[20] Pacific raised "ability to pay" the proposed penalty as an issue at hearing, but the Presiding Officer rejected its claim. Pacific has not raised ability to pay on appeal, and therefore the Board has not considered ability to pay as a factor warranting any further reduction in the penalty.

III. *CONCLUSION*

For the foregoing reasons, a civil penalty of $111,762 is assessed against Pacific Refining Company in accordance with EPCRA § 325 for violations of EPCRA § 313, as described in Counts I through X of the complaint. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of service of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA -- Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

So ordered.

Dissenting Opinion by Judge McCallum:

Because the penalty imposed by the Presiding Officer is fair and reasonable in light of the function civil penalties are supposed to serve under the Act, I would sustain it even though the amount does not conform to the EPCRA Enforcement Response Policies (referred to as the 1988 and 1992 ERPs, above). In this regard, the Board has accepted, as do I, the Presiding Officer's findings that (i) Pacific's failure to file the requisite forms was an aberration (resulting from the upheaval in management) and (ii) Pacific's new management has made a "hard nosed" commitment to comply with its EPCRA obligations, thus making it unlikely that future filing obligations will go unattended. Based upon the record, the Presiding Officer's conclusions appear to be well-supported.[21] Together they are sufficiently compelling to satisfy the regulatory requirement imposed on the

---

[21] For example, Pacific's environmental manager affirmed that "the law says you have to file on a specific date and it doesn't * * * provide any relief for whatever causes not to file." Tr. at 118. He explained that Pacific had implemented a system whereby all reports would be timely filed "do or die," and he emphasized that:

> [M]y management principle is simple, you know when you're supposed to do it, if you don't advise me that there's a problem with it and you can't make that date, then I really don't have a need for you on my staff. I mean there's just no excuse for it. And to this date we haven't missed a date since that filing back in 1989.

Id. at 119.

Presiding Officer to explain his reasons for assessing a penalty different from that which U.S. EPA Region IX proposed in the complaint. *See* 40 C.F.R. § 22.27(b). These reasons also make it apparent that exacting a penalty in strict conformity with the percentage limitations set by the EPCRA penalty guidelines (the 1988 and 1992 ERPs) will serve little purpose other than to punish Pacific for the sake of punishment.

My own perspective on the penalty provisions of the statute and regulations is to emphasize their deterrent function (which includes removal of all competitive advantages resulting from noncompliance). *Accord* EPA General Enforcement Policy No. GM-22, at 1 (Feb. 16, 1984) (goals for penalty assessment are "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems"). Indeed, it is a maxim of the Agency's *corpus juris* that "[c]ivil penalties * * * are intended to deter through regulation, not reprimand through punishment." *See, e.g., In re Ray Birnbaum Scrap Yard*, TSCA Appeal No. 92-5, at 7 (EAB, March 7, 1994) (quoting *In re Briggs & Stratton Corp.*, TSCA Appeal No. 81-1 (JO, Feb. 4, 1981)); *In re South Coast Chemical, Inc.*, FIFRA Appeal No. 84-4 (CJO, Mar. 11, 1986) (same); *In re Coharie Mill & Supply Co., Inc.*, Doc. No. IF&R-04-8545-C (ALJ, Mar. 20, 1986) (same). Legitimate retribution as a component of deterrence should be reserved for those instances where the violator's noncomplying behavior would have continued indefinitely (whether through ignorance, neglect or design) but for its discovery by government enforcement officials. In the case of Pacific, it is clear that Pacific had already discovered its mistake, was in the process of correcting it, and would have soon brought itself into compliance without any intervention by the government. It is equally clear that Pacific complied with all past filing requirements and now fully recognizes the need for an even stronger commitment to compliance in the future. The single year in which Pacific did not comply with the filing requirement was uncharacteristic and is not likely to recur. These circumstances, as more fully described in the Initial Decision, justify this tribunal's exercising its discretion to deviate substantially from the guidelines. No matter how flexible the penalty guidelines might be in adapting to a wide variety of situations, there still will be some instances, such as this case, where the interests of justice are better served by breaking from the formulaic constraints of the guidelines. This is why the regulations and past Agency decisions recognize that the Presiding Officer and the Agency's appellate reviewing authority are free to deviate from the guidelines, so long as the reasons for the deviation are explained on the record. The Board, by sticking *uncompromisingly* to the guidelines mold and assessing a penalty that exceeds the Presiding Officer's $25,000.00 penalty assessment by nearly $87,000.00, is inflicting a degree of punishment upon Pacific that I regard as clearly disproportionate to what is necessary to achieve deterrence in this case.

It has long been the position of the Agency that our regulations governing the assessment of civil penalties do not bind either the presiding officer or the final decision-maker (in this case, the Board) to the formulas set forth in the penalty guidelines. *See, e.g., In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB, June 29, 1994) (dicta); *In re General Electric Company*, TSCA Appeal No. 92-2a, at 28 (EAB, Nov. 1, 1993) (accepting the Presiding Officer's penalty assessment while noting that "the Presiding Officer disregarded the 1980 PCB Penalty Policy"); *In re 3M Company*, TSCA Appeal No. 90-3, at 22 (CJO, Feb. 28, 1992); *In re ALM Corp.*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991) (dicta); *In re Empire Ace Insulation Mfg. Corp.*, TSCA Appeal No. 86-4 (CJO, June 28, 1990) (dicta); *In re A.Y. McDonald Industries, Inc.*, RCRA (3008) Appeal No. 86-2, at 18-19 (CJO, July 23, 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."); *In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7, at 7-8 (CJO, Feb. 27, 1987) (citing additional cases at note 13). I hope that the Board's adherence to the penalty guidelines in this case does not signal a trend away from this line of authority, for the consequences may be similar to those experienced by the Federal Communications Commission in *U.S. Telephone Ass'n v. Federal Communications Commission*, 28 F.3d 1232 (D.C. Cir., decided July 12, 1994). In *U.S. Telephone Ass'n* the D.C. Circuit held that the FCC's administrative penalty schedule was not merely a "policy statement" that provides guidance to the Commission in imposing fines, but was in fact a "framework for sanctions" intended to cabin the Commission's discretion, and therefore the schedule was subject to APA rulemaking procedures. *Id*. According to the D.C. Circuit, the FCC labeled its forfeiture standards a "policy statement" and "reiterated 12 times that it retained discretion to depart from the standards in specific applications." *U.S. Telephone Ass'n*, 28 F.3d at 1234. The Court nevertheless found unavailing the Commission's effort to distinguish between its "policy statement" and substantive rules subject to APA notice-and-comment. The distinction, in the Court's view, turned on the FCC's intent to bind itself to the penalty schedule contained in the "policy statement." Although the FCC had expressed a different intention in its public pronouncements, the Court found that the FCC had in fact adhered to the schedule in the overwhelming majority of cases in which the schedule had been applied. The Court therefore set aside the FCC's forfeiture standards, and ruled that they should have been issued for comment under the Administrative Procedure Act.

If the Board persists in its adherence to the penalty guidelines, while steadfastly maintaining that neither it nor the Presiding Officer is "bound" by the guidelines, its statements to that effect may ring hollow to a Court of Appeals in some future case. Accordingly, I would urge the Board to demonstrate greater

flexibility in its oversight of the Presiding Officer's penalty determinations.[22] That was not done in this case; therefore, I respectfully dissent from today's decision.

---

[22] *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, also decided today by the Board, is cited by the majority as an example of its readiness to deviate from the penalty policy. *See* note 16, *supra*. If this is indeed true, and if there is a possibility that the instant dissenting opinion has contributed to this signal of flexibility, then I salute it and regard the purpose of the dissent as largely fulfilled -- but not without disappointment since this encouraging development offers no solace to Pacific.